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Public Company Accounting Oversight Board

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PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

In the Matter of S. Brent Farhang, CPA, Respondent	PCAOB File No. 105-2016-001 **FINAL DECISION** March 16, 2017

Appearances

C. Ian Anderson and Craig L. Siegel, New York, NY, for the Division of Enforcement and Investigations

Scott Vick, Vick Law Group, APC, Los Angeles, CA, for Respondent

I.

S. Brent Farhang, CPA, has petitioned for Board review of the hearing officer's initial decision, which found on summary disposition that Farhang refused to cooperate with a Board investigation and which ordered sanctions. Farhang concedes that he refused to appear for investigative testimony but contends that the Board lacks the authority to require him to appear or to impose a civil money penalty for his refusal and that a civil money penalty is otherwise inappropriate in this case. For the reasons discussed below, we reject Farhang's arguments and impose a censure, a bar from association with a registered public accounting firm, and a $50,000 civil money penalty.

II.

Farhang is a 57-year-old certified public accountant who at all relevant times was a person associated with a registered public accounting firm as defined in Section 2(a)(9) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7201(9), and PCAOB Rule 1001(p)(i). Index to the Record on Review, Record Document (R.D.) 22c, Ex. 11. At the time of his refusal to testify, Farhang was a partner with a registered public accounting firm in Los Angeles, California where he worked on issuer audits. R.D. 23d, Ex. 1 at 8-9. Prior to then, he was associated with another registered public accounting

firm, Goldman Kurland and Mohidin, LLP (GKM or the Firm), also in Los Angeles. *Id.* As pertinent here, GKM audited the financial statements of a certain issuer, referred to here as Issuer A, for the fiscal year ended June 30, 2012. *Id.* at 17. Farhang was the audit manager on that engagement. R.D. 23d, Ex. 13.

III.

A. The PCAOB opened an investigation of GKM and its associated persons.

On December 16, 2014, the Board issued an Order of Formal Investigation (OFI) pursuant to Sarbanes-Oxley Act Section 105(b)(1), 15 U.S.C. 7215(b)(1), and PCAOB Rule 5101(a)(1) authorizing the Division of Enforcement and Investigations to conduct a formal investigation of the Firm and its associated persons. R.D. 23d, Ex. 14. The OFI concerned potential violations of PCAOB rules and auditing standards related to the Firm's audits of the financial statements of certain issuers, including Issuer A. Pursuant to the OFI, the Division issued an Accounting Board Demand (ABD) to the Firm in December 2014 requiring the production of documents and information that concerned, among other things, the Issuer A audit. R.D. 23d, Ex. 15; *see* PCAOB Rule 5103.

On June 30, 2015, the Division issued ABDs to Farhang as well as to Ahmed Mohidin, who served as the engagement partner for the Issuer A audit, and one other person associated with the Firm, requiring them to produce certain documents and information and appear for testimony at the PCAOB's New York offices. R.D. 23d, Exs. 23-25. As previously agreed to by the Division and counsel jointly representing Farhang and Mohidin, the June 30, 2015 ABDs set Mohidin's testimony for September 14-17, 2015 and Farhang's testimony for September 30 and October 1, 2015. R.D. 23d, Exs. 23, 25-26. The Division also agreed, at the request of Farhang and Mohidin, to reimburse them for the reasonable costs associated with traveling to New York for testimony. R.D. 23d, Ex. 27. Along with the June 30, 2015 ABDs, the Division enclosed copies of a PCAOB form (Form ENF-1), which informed Farhang and Mohidin of their rights and duties as witnesses and the consequences of a refusal to give testimony in connection with a Board investigation. In response to the June 30, 2015 ABD issued to him, Farhang produced six emails and a signed PCAOB Witness Background Questionnaire on July 14, 2015. R.D. 23d, Exs. 28-29.

B. Mohidin, represented by the same counsel as Farhang, gave testimony suggesting possible misconduct by Farhang.

As scheduled, the Division took testimony from Mohidin on September 14-17, 2015 at the PCAOB's New York office. R.D. 23d, Ex. 30. During the testimony, at which counsel for Mohidin and Farhang was present, the Division questioned Mohidin

regarding, among other things, the Issuer A audit. R.D. 23d, Exs. 30-31. As part of that questioning, the Division showed Mohidin several documents indicating Farhang may have made late modifications to the Issuer A audit work papers without properly documenting those modifications, in potential violation of PCAOB Auditing Standard No. 3, *Audit Documentation*. R.D. 23d, Ex. 32. Mohidin testified that he was "troubled" by the documents. *Id.* at PCAOB-FARHANG-5422-001367.

C. Farhang withdrew his agreement to provide testimony and refused to appear.

Approximately one week later, on September 25, 2015—more than three months after Farhang agreed to appear in New York for testimony and five days before he was scheduled to give testimony—Farhang's counsel informed the Division that Farhang would not appear for testimony, stating that "Mr. Farhang has decided that he will exercise his right to decline to appear for testimony." R.D. 23d, Ex. 33 at 3. The Division responded the same day by email stating as follows:

> I understand your email to mean that Mr. Farhang refuses to provide any testimony in the above-referenced matter, and not just that he refuses to testify next week. If that is not correct, please let me know immediately. A refusal to provide testimony as required by an Accounting Board Demand constitutes noncooperation under the Act and Board rules, and is grounds for instituting a disciplinary proceeding. See Board Rule 5110(a).

R.D. 23d, Ex. 33 at 3. In response, Farhang's counsel reiterated, "Mr. Farhang is exercising his right to decline to testify in this matter." *Id.* at 2. The Division sought to clarify with counsel why Farhang was refusing to testify and provided an additional warning that Farhang's conduct would constitute noncooperation:

> With respect to Mr. Farhang, please provide a detailed explanation as to the basis for his belief that he has a right to not appear for testimony in this matter. Mr. Farhang's rights with respect to his obligation to appear for testimony are set forth in the ENF-1 enclosed with his ABD, and in the Act and Board Rules, and those rights do not include the prerogative to simply refuse to appear for testimony at any time. We consider his refusal to constitute noncooperation with an investigation and will proceed accordingly.

Id. at 1. In response to the Division's further inquiry, Farhang's counsel replied (*id.*):

> The PCAOB cannot force any person to testify. Any person who does not wish to testify in response to an ABD has a right not to testify. The PCAOB might take the position, as it has in other cases, that there are consequences. If you reach that point, Mr. Farhang reserves the right to assert any defense or bring any claim, including a claim for lack of jurisdiction and constitutional claims.

Farhang failed to appear at the PCAOB's New York office to give testimony on September 30, 2015, and the same day the Division sent a letter to Farhang advising him that Division staff intended to recommend that the Board commence a disciplinary proceeding to determine whether Farhang had refused to cooperate with a Board investigation. R.D. 23d, Exs. 34-37; R.D. 17, Answer (Ans.) 1 ¶¶ 1-3, 2 ¶ 7, 3 ¶ 18. The letter notified Farhang that he could submit, by October 7, 2015, a written statement to the Division, pursuant to PCAOB Rule 5109(d), setting forth his position as to whether a disciplinary proceeding should be commenced. R.D. 23d, Ex. 34.

On October 7, 2015, Farhang, through counsel, submitted a short statement of position (SOP) responding to the Division's September 30, 2015 letter. R.D. 23d Exs. 36, 37. The SOP did not offer any alternative dates or arrangements for Farhang's testimony but instead asserted, among other things, that he had "severely limited financial resources and more important financial obligations," could not "afford to retain counsel to represent him," and noted that his native language is not English. R.D. 23d, Ex. 37. Farhang concluded his SOP by asserting that he had otherwise complied with the June 30, 2015 ABD and was only a manager at the time of the relevant audits and reviews, and by asking that the Board "defer taking any disciplinary action against him." *Id.* When contacted by the Division on October 7, 2015, Farhang's counsel stated that he continued to represent Farhang in this matter, "but [Farhang] can no longer afford to have me do anything." R.D. 23d, Ex. 38.

On October 26, 2015, the Division sent Farhang a letter addressing his SOP and informing him that the information Farhang had provided in the SOP did not constitute "valid reasons for Mr. Farhang to refuse to testify." R.D. 23d, Ex. 40 at 1. Among other things, the Division pointed out that PCAOB Rule 5401 permitted Farhang to represent himself. *Id.* The Division also noted that documents produced by Farhang and the Firm "show that he can communicate fluently in English" but offered, "if Mr. Farhang reasonably believes that an interpreter is necessary," to "make one available." *Id.* at 2. The Division reconfirmed its willingness to reimburse Farhang for his flight to New York, hotel accommodations, and other reasonable expenses associated with his appearing for testimony. *Id.* Alternatively, the Division offered to take his testimony in Los Angeles or at another convenient location. *Id.* The Division concluded its letter by

requesting that Farhang let the Division know, once again, whether he would agree to appear for testimony, and to do so no later than November 2, 2015. *Id.* The Division received no response by that date and sent a follow-up email to Farhang's counsel on November 9, 2015. R.D. 23, Ex. 41 at 1.

The same day, Farhang's counsel emailed the Division a response that repeated some of the points in the SOP and concluded that for the reasons set forth therein, "Mr. Farhang is unable to testify." R.D. 23d Ex. 41 at 1.

D. The Board instituted disciplinary proceedings.

On January 12, 2016, the Board issued an Order Instituting Disciplinary Proceedings against Farhang pursuant to Sarbanes-Oxley Act Section 105(c), 15 U.S.C. 7215(c), and PCAOB Rule 5200(a)(3). R.D. 1. On February 10, 2016, the hearing officer issued an order deeming Farhang in default because he had failed to answer or attend the initial prehearing conference. R.D. 10. Pursuant to that order, on February 24, 2016 the Division filed a motion for a default decision, which asked the hearing officer to determine the proceeding against Farhang and sanction him with a censure, a permanent bar from being associated with any registered public accounting firm, and a $75,000 civil money penalty. R.D. 12.

Prompted by the Division's motion, which Farhang's counsel characterized as "making an unconstitutional demand for a $75,000 civil money penalty against Farhang" (R.D. 14a at 3), the counsel filed a notice of appearance on February 27, 2016 (R.D. 13) and a motion to set aside the default on March 2, 2016 (R.D. 14). The brief in support of that motion stated that the counsel "agreed to represent Farhang without charge" and that "Farhang's failure to appear at the Initial Prehearing Conference and file an Answer grew out of his inability to pay counsel to research, apply and articulate [the] complex arguments [which constitute his defense] that very few lawyers even understand." R.D. 14a at 3, 4. On March 3, 2016, the hearing officer set aside the default. R.D. 15.

Farhang filed an answer on March 11, 2016. The answer admitted, among other things, that he "did not appear for testimony as scheduled and has repeatedly refused to appear for testimony on any other date" in connection with a Board investigation while he was an associated person of a registered public accounting firm. Ans. at 1, ¶¶ 1-3. It denied, however, that he had an obligation to comply with the ABD. Ans. at 1, ¶ 2.

E. The hearing officer granted the Division's motion for summary disposition and ordered sanctions, and Farhang appealed.

The Division and Farhang filed cross-motions seeking summary disposition under PCAOB Rule 5427(d). *See* R.D. 15 at 4; R.D. 16b at 17, 28-29; R.D. 18 at 1;

R.D. 22; R.D. 22a at 1, 23; R.D. 23; R.D. 23a at 12-15. After briefing, the initial decision found that it was undisputed that Farhang repeatedly refused to comply with an ABD to appear for testimony during the Division's investigation of the Firm. R.D. 27, Initial Decision (I.D.) 12. The decision rejected Farhang's arguments that his refusal to testify was legally justified and concluded that he "failed to cooperate with a Board investigation without a valid justification." I.D. 12-17. It ordered that he be censured and barred from associating with a public accounting firm and also concluded that "Farhang will be ordered to pay a civil monetary penalty of $75,000, but such payment will be waived based on Farhang's demonstrated inability to pay a civil penalty." I.D. 22.

On August 22, 2016, Farhang petitioned for Board review of the initial decision. R.D. 28, Petition for Review (Pet.). The last appeal brief was filed on December 14, 2016. R.D. 34, Reply Brief (Reply Br.). Neither party requested oral argument.[1/]

IV.

PCAOB Rule 5427(d) provides that "[t]he hearing officer shall promptly grant a motion for summary disposition if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a disposition as a matter of law." This rule, in substance, parallels Rule 56 of the Federal Rules of Civil Procedure, as well as Rule 250 of the SEC Rules of Practice. Under these provisions, the question is whether the record as a whole demonstrates the existence of any factual disputes that must be resolved through a hearing. *See R.E. Bassie & Co.*, SEC Rel. No. AAE-3354, 2012 SEC LEXIS 89, *27-*28 (Jan. 10, 2012); *see also, e.g., National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995).

Sarbanes-Oxley Act Section 105(b)(3), 15 U.S.C. 7215(b)(3), *Noncooperation with Investigations*, authorizes the Board to impose sanctions if a registered public accounting firm or associated person "refuses to testify, produce documents, or otherwise cooperate with the Board in connection with an investigation," and PCAOB Rule 5300(b) provides for sanctions if such a firm or person "has failed to comply with an accounting board demand, has given false testimony or has otherwise failed to cooperate in an investigation." There is no genuine issue of material fact concerning whether Farhang refused to appear for testimony in response to the ABD issued to him on June 30, 2015, and he concedes that he so refused.

[1/] On September, 13, 2016, the PCAOB instituted and settled disciplinary proceedings against the Firm and Mohidin for violating PCAOB rules and auditing standards. *Goldman Kurland and Mohidin, LLP and Ahmed Mohidin, CPA*, PCAOB Rel. No. 105-2016-027 (Sept. 13, 2016).

The questions before us for decision are whether any of Farhang's arguments as to the legal authority of the Board to sanction him for such misconduct are meritorious and, if not, what sanctions are appropriate.

V.

Sarbanes-Oxley Act Section 105(b)(3) authorizes the Board to sanction firms and associated persons for refusing to cooperate with an investigation. That authority is fundamental to the Board's mandate to "protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports," Sarbanes-Oxley Act Section 101(a), 15 U.S.C. 7211(a), and to its corollary duty, set out in Section 101(c)(4), 15 U.S.C. 7211(c)(4), to "conduct investigations and disciplinary proceedings concerning, and impose appropriate sanctions where justified upon, registered public accounting firms and associated persons of such firms, in accordance with section 105." *See Bassie*, 2012 SEC LEXIS 89, *38-*39 ("investigations play a crucial role in furthering" the goals of the PCAOB). The Board's authority to sanction refusals to cooperate promotes the prompt and full cooperation by firms and their associated persons with PCAOB investigations and is integral to the regulatory system established by Congress. *Cf. Charles C. Fawcett, IV*, SEC Rel. No. 34-56770, 2007 WL 3306105, *6 (Nov. 8, 2007).

Longstanding precedent holds that securities industry self-regulatory organizations (SROs), which are charged with the duty to effectuate the purposes of various federal laws and on which the PCAOB is modeled, have authority to sanction firms and associated persons for failure to cooperate with an investigation. *See, e.g., United States v. Solomon*, 509 F.2d 863, 869-70 (2d Cir. 1975); *Howard Brett Berger*, SEC Rel. No. 34-58950, 2008 WL 4899010, *7 (Nov. 14, 2008) (discussing origin and necessity of NASD's authority to sanction regulated persons for failure to respond to requests for information), *aff'd*, 347 Fed. Appx. 692 (2d Cir. Oct. 1, 2009) (unpub.). The government, to make best use of its limited resources, commonly relies on "private organizations to effectuate the purposes underlying federal regulating statutes," and the courts have recognized that with that responsibility must also fairly come the authority to sanction persons within their jurisdiction for noncooperation, for there would be "a complete breakdown" in regulation if those organizations did not "carry most of the load of keeping [regulated persons] in line and have the sanction of discharge for refusal to answer what is essential to that end." *Solomon*, 509 F.2d at 869-70.[2/]

[2/] The PCAOB was "modeled on private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to Commission oversight." *Free Enterprise Fund v. PCAOB,* 561 U.S. 477, 484 (2010). The PCAOB was established by statute as a non-profit corporation that is not an agency or establishment of the United States

The Board, in the exercise of its statutory authority and consistent with the precedent in the SRO context, has rendered several prior decisions in litigated noncooperation cases, stating foundational principles in this area, in addition to issuing numerous settled orders.[3/]

The first of the adjudicated cases was *R.E. Bassie & Co.*, PCAOB Rel. No. 105-2009-001 (Oct. 6, 2010). In that case, Bassie at first cooperated with a Board investigation by providing testimony, but he and his firm, of which Bassie was sole proprietor, refused to respond to subsequent requests for documents. The Board sanctioned Bassie and his firm based on respondents' repeated failure to produce documents in response to two ABDs "despite the Division's repeated warnings, over several months, that such noncooperation could result in disciplinary sanctions." *Id.* at 12. Explaining the importance of cooperation with investigations, the Board stated that "[c]onducting investigations in an appropriate and timely manner depends upon

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Government. Sarbanes-Oxley Act Sections 101(a) & (b), 15 U.S.C. 7211(a) & (b). In *Free Enterprise Fund*, the Supreme Court stated that, although "the parties agree that the Board is 'part of the Government' for constitutional purposes," "Board members and employees are not considered Government 'officer[s] or employee[s]' for statutory purposes." 561 U.S. at 484, 485-86 (citations omitted).

[3/] *See, e.g., Deloitte Touche Tohmatsu Auditores Independentes*, PCAOB Rel. No. 105-2016-031 (Dec. 5, 2016) (imposing, among other sanctions, an $8 million civil money penalty for combination of noncooperation and other charges); *Arturo Vargas Arellano, CPC*, PCAOB Rel. No. 105-2016-045 (Dec. 5, 2016) (barring engagement partner and imposing $50,000 civil penalty for combination of noncooperation and other charges); *Tony Zhicong Li, CPA*, PCAOB Rel. No. 105-2016-023 (June 14, 2016) (permanent bar on partner for refusing to continue with scheduled testimony after appearing the first day and failing to comply with subsequent ABD); *Edith LAM Kar Bo*, PCAOB Rel. No. 105-2016-002 (Jan. 12, 2016) (three-year bar on Hong Kong-based partner for refusing to appear for testimony); *Paul W. Marchant, CPA*, PCAOB Rel. No. 105-2014-006 (May 6, 2014) (three-year bar on senior manager for providing false documents and testimony in investigation); *Chintapatla Ravindemath*, PCAOB Rel. No. 105-2010-005 (Mar. 16, 2010) (permanent bar on senior manager for refusal to appear for testimony); *Siva Prasad Pulavarthi*, PCAOB Rel. No. 105-2010-004) (Mar. 16, 2010) (same); *Moore & Assocs., Chartered*, PCAOB Rel. No. 105-2009-006 (Aug. 27, 2009) (revocation of firm's registration and permanent bar on firm president for combination of noncooperation and other charges; no civil penalty because "Moore has agreed to pay a civil monetary penalty to the U.S. Securities and Exchange Commission in the matter styled *SEC v. Michael J. Moore and Moore & Associates Chartered*, Case No. 2:09-cv-01637 (D. Nev. Filed August 27, 2009)").

registered firms' and associated persons' compliance with demands for documents and testimony made pursuant to the Board's authority under the Act. Noncooperation frustrates the oversight system by impeding the Board's ability to determine whether violations have occurred for which sanctions should be imposed, including sanctions that would protect investors from further violations, and thus deprives investors of an important protection that the Act was intended to provide." *Id.* at 11. The Board rejected respondents' arguments that the sanctions should be mitigated by their late offer to the Board to make the requested documents available for review and by the lack of evidence of direct harm to investors. *Id.* at 11-12. In concluding that revocation of the firm's registration and a bar on the auditor's association with any registered accounting firm were warranted, the Board noted that respondents at first told the Division they intended to cooperate but then simply stopped responding; the Board found that "such noncooperation indicates a lack of sufficient regard for Board processes and authority designed by statute to protect investors." *Id.* at 12.

In *Bassie,* the Board also determined that a civil money penalty was "plainly appropriate." *Id*. at 15. We noted, among other things, that the respondents "disregarded their obligation to cooperate with the Board's investigation," that such noncooperation "is a harm to investors and markets that factors into a sanctions analysis," and that a civil penalty for noncooperation is appropriate as a deterrent to those who would otherwise be encouraged to not cooperate in order to "prolong the period of their registration and maximize their income from issuer audit work before being sanctioned." *Id.* at 16. In ordering a $75,000 penalty in that case, we observed "this is well below the maximum penalty that we could impose" but "nonetheless reflects the seriousness of Respondents' noncooperation, including the harm to investors from the possibility that such noncooperation may have prevented the Board from uncovering evidence that would have revealed failures or violations warranting an even steeper penalty" and "is sufficient to deter similar noncooperation by others." *Id.* at 19-20.

The Securities and Exchange Commission (Commission or SEC) affirmed the Board's imposition of sanctions. *Bassie*, 2012 SEC LEXIS 89. In its decision, the Commission confirmed the principles set forth by the Board, reiterating, for example, that "[t]he Board's investigatory power is central to its ability to carry out its statutory responsibilities and fulfill its goals in the public interest," *id.* at *48, and that "failure to cooperate in an investigation is very serious misconduct," *id.* at *40. The Commission concluded that revocation and an associational bar were warranted because, among other things, "noncooperation indicates a lack of sufficient regard for Board processes and authority designed by statute to protect investors." *Id.* at *42. The Commission further determined that "[t]he need for deterrence…supports a civil penalty," and that, "[w]hile imposing a larger penalty in this case might provide an even greater deterrent against similar [noncooperation] by other registered public accounting firms and their associated persons, a civil penalty of $75,000 appears sufficient to have a deterrent

effect on a firm such as Bassie's." *Id.* at *48, *51-*52. The Commission underscored that "[t]he Board's power to impose appropriate sanctions in disciplinary proceedings is fundamental to its ability to act in the public interest," stating that the ability to enforce cooperation from regulated persons is "'at the heart of the self-regulatory system for the securities industry.'" *Id.* at *40, *40 n.38 (quoting *Berger*, 2008 WL 4899010, *4).

In *Larry O'Donnell, CPA, P.C.*, PCAOB File No. 105-2010-002 (Oct. 19, 2010), the Board reviewed a hearing officer's initial decision that had imposed sanctions upon an auditor and his firm for noncooperation. O'Donnell, like Bassie, originally cooperated with a Board investigation by providing testimony, but thereafter he and the firm, of which he was sole principal, refused to respond to further requests for documents contained in two ABDs. *Id.* at 3-5. Respondents did not respond in any way to the resulting institution of proceedings against them, and the hearing officer found them in default and ordered sanctions. *Id.* at 5. On review, the Board found that respondents' failure to respond to the ABDs constituted noncooperation that warranted revocation of the registration of the firm and a permanent associational bar on O'Donnell, finding that "[r]espondents' noncooperation prevented the Board from being able to follow up adequately on indications of possible violations of law and PCAOB Rules" and that "[t]his type of noncooperation undermines the Board's ability to protect investors and advance the public interest, and indicates a lack of sufficient regard for Board processes and authority designed to do so." *Id.* at 7. The Board concluded that a civil money penalty of $75,000 against O'Donnell was appropriate, noting that this amount is "well below the maximum penalty that we could impose" but "reflects the seriousness of the noncooperation, including the harm to investors from the possibility that such noncooperation may have prevented the Board from uncovering evidence that would have revealed failures or violations warranting an even steeper penalty." *Id.* at 14.

In *Davis Accounting Group, P.C.*, PCAOB Rel. No. 105-2009-004 (Mar. 29, 2011), *pet. for review dismissed*, SEC Rel. No. 34-65581, 2011 WL 4954239 (Oct. 18, 2011), the Board found, on review of a decision by the hearing officer on summary disposition, that Edwin Davis and his firm failed to produce documents to the Division as requested in ABDs for more than 20 months, producing some documents only after the Board instituted proceedings against them for noncooperation. The Board found that respondents' conduct warranted revocation of the firm's registration and a permanent associational bar on Davis, noting that Davis acknowledged that he and his firm "made a choice" to "develop their business and issue audit reports" "rather than comply with regulatory requirements" and determining that "such noncooperation indicates a lack of sufficient regard for Board processes and authority designed by statute to protect investors." *Id.* at 15. The Board also imposed a $75,000 civil money penalty on Davis, noting the respondents' "disregard" of their obligation to comply with the Board's investigation, the "indirect harm to others" caused by their misconduct, and the "seriousness of the noncooperation." *Id.* at 19, 22.

As we explain below, Farhang's arguments do not persuade us that the Board lacks statutory authority to sanction him for refusing to testify, including through the imposition of a civil money penalty, or that doing so is contrary to the Constitution.

A. The Board's authority to sanction Farhang for noncooperation is not conditioned on his consent to cooperate.

Farhang argues that the Board's authority under Section 105(b)(3) to sanction persons for refusal to cooperate with a Board investigation is contingent upon a separate provision of the statute, Section 102(b)(3), 15 U.S.C. 7212(b)(3). Farhang claims that these two sections of the statute must be read together to mean that "[a]n auditor must provide an advanced written consent under Section 102(b)(3) before the Board even has the ostensible authority to impose a noncooperation sanction against the auditor under Section 105(b)(3)." R.D. 28 at 2-3. According to Farhang, he cannot be sanctioned for refusing to cooperate with any Board investigation because he never provided that consent to the Firm. Farhang's position is that the Board's authority to sanction an associated person for refusing to cooperate with an investigation is determined by the personal choice of that individual in providing or withholding the consent. In fact, the specific sanctioning authority provided by Section 105(b)(3) does not depend upon the associated person in question having provided such a consent.

Section 102(b), captioned *Applications for Registration*, governs the form and content of a public accounting firm's application for PCAOB registration. Section 102(b)(3) requires that each such application include the firm's "agreement to secure and enforce," and a statement that the firm understands and agrees that the continuing effectiveness of its registration is conditioned on "securing and enforcement of," consents from its associated persons, "as a condition of their continued employment by or other association with such firm," "to cooperation in and compliance with any request for testimony or the production of documents made by the Board in furtherance of its authority and responsibilities" under the Sarbanes-Oxley Act. By the plain terms of Section 102(b), a firm's failure to make those statements may have consequences for the firm's registration application, and a registered firm's failure to act in accordance with those statements may have consequences for the firm's registration status.

But the Sarbanes-Oxley Act does not suggest any connection between those firm registration provisions and the distinct and unqualified authority, in Section 105(b)(3), to impose sanctions on an associated person who refuses to testify in connection with a PCAOB investigation. If Congress had intended the law to be understood as Farhang urges, it would have been a simple matter for Congress to have made that clear by including a clause in Section 105(b)(3) so that, instead of encompassing "any associated person," it encompassed only "any associated person who has executed a

consent described in Section 102(b)(3)(A)."[4/] Even when Congress amended Section 2(a)(9) of the Sarbanes-Oxley Act to make clear that the sanctioning authority under Section 105(b)(3) encompassed a person's noncooperation relating to a period when that person was "seeking to become associated" or was "formerly associated" with the firm, Congress did not suggest that it mattered whether that person had already executed a consent described in Section 102(b)(3)(A). *See* Section 2(a)(9)(C)(ii)(II), as added to the Sarbanes-Oxley Act by Section 929F(g)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203 (July 10, 2010).[5/]

Farhang concedes there is no statutory language explicitly stating that "consent [is] required as a condition of imposing discipline under Section 105(b)(3)," and he is left to argue that consent is an "implicit" condition. *E.g.*, R.D. 34 (Reply Brief (Reply Br.)) 2, 6. He argues that it must be a condition because he can discern no purpose for requiring firms to obtain consents from their employees except to give rise to the Board's jurisdiction to sanction persons for noncooperation, and thus he concludes that asking firms to obtain written consents would be "a meaningless formality" if his interpretation is wrong. R.D. 30 (Opening Brief (Br.)) 3. But the fact that Farhang cannot discern any other legislative purpose for Section 102(b)(3) that he would credit is not a persuasive argument that Section 105(b)(3) does not mean what it very precisely

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[4/] Farhang does not contend that the lack of a consent had any effect on whether he was an "associated person," and he does not dispute that he was an associated person as that term is used in Section 105(b)(3). A person is an associated person of a registered public accounting firm if, in connection with the preparation or issuance of any audit report, that person (i) shares in the profits of, or receives compensation in any other form from, a registered public accounting firm; or (ii) participates as agent or otherwise on behalf of such an accounting firm in any activity of that firm. Sarbanes-Oxley Act Section 2(a)(9)(A), 15 U.S.C. 7201(a)(9)(A); PCAOB Rule 1001(p)(i).

[5/] Although not directly relevant to the application of Section 105(b)(3), we note that associated persons of members of a registered securities association, such as FINRA, (as that category of persons is defined in Section 3(a)(21) of the Securities Exchange Act of 1934) (Exchange Act) are expected to have executed a securities industry Form U-4, which includes among other things their consent to "submit to the authority of the jurisdictions and SROs and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the jurisdictions and SROs" and to "comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by the jurisdictions and SROs," but there is no suggestion in the Exchange Act, or in any Commission or court decisions of which we are aware, that the registered securities association's authority to sanction a person who meets the definition in Section 3(a)(21) depends upon that person having actually provided such a consent.

says. Moreover, it is not difficult to identify useful purposes that Farhang apparently overlooks. For example, he fails to appreciate that conditioning a firm's registration on a manifestation of the firm's direct involvement in fostering its associated persons' awareness of both the possibility of being called upon to cooperate in the Board's processes and the potentially severe consequences of failing to do so, has value wholly unrelated to the Board's jurisdiction to sanction the firm and its associated persons.

In addition to being at odds with the plain language of Section 105(b)(3), Farhang's argument posits no rationale for why Congress would have meant for associated persons to avoid the possibility of Section 105(b)(3) sanctions just because they declined to provide a consent and they worked for a registered firm that failed to secure and enforce such consents. Instead of suggesting any such rationale, Farhang essentially argues that it would not have occurred to Congress that such a situation might arise, and therefore Congress cannot have intended that Section 105(b)(3) would address it. Specifically, Farhang contends that, given the specter of job loss, "it would be natural" for Congress to "*assume* and presuppose" that every associated person would execute a consent before they could ever be in a position to refuse to cooperate with the Board. Reply Br. 6 (emphasis in original). Farhang then reasons that "having naturally assumed" that all necessary consents would be provided, Congress would have had no reason to address situations in which consents were not provided. *Id.* But this does not explain why Congress would have put the Board's sanctioning authority for noncooperation at the mercy of such speculative presupposition and assumption, which would essentially exempt any person from discipline for failure to cooperate who, by design or otherwise, actually subjected themselves to the risks Farhang describes.[6/]

A firm's failure to secure and enforce consents from its associated persons does not immunize those associated persons from sanctions for noncooperation. The

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[6/] To further illustrate that Farhang's position has consequences Congress would not have intended, we note that presumably he takes the view that the Board could sanction a person for noncooperation, under the Sarbanes-Oxley Act as amended in July 2010, who tendered a consent when a firm applied for PCAOB registration, even if the person briefly was seeking to but ultimately did not become associated with the firm, yet the Board could not reach a person who became associated with the firm at some later date and functioned in that capacity for a long period of time if the firm neglected to secure a consent from that person. Just as we have noted that a registered firm would be subject to sanctions if it did not cooperate and comply with Board requests even if the firm had not provided a consent that it would do so, *see Policy Statement Regarding Credit for Extraordinary Cooperation in Connection with Board Investigations*, PCAOB Rel. No. 2013-003, at 2 n.3 (Apr. 24, 2013), an associated person is subject to sanctions if he or she does not cooperate and comply even if he or she has not signed a consent to do so.

Board's authority to sanction associated persons for refusing to cooperate with an investigation flows sensibly, directly, and unimpededly from Section 105(b)(3).

B. Imposing Sanctions for Farhang's Refusal To Testify Does not Violate the Constitution.

Farhang also challenges on constitutional grounds the Board's authority to impose sanctions for his refusal to testify. His arguments attempt to weave together various constitutional threads. He asserts, with apparent reference to Section 102(b)(3), that because the Sarbanes-Oxley Act "conditions [his] initial and continued employment on the requirement that he subject himself to severely diluted due process (that fails to pass constitutional muster) under an unconstitutionally vague and amorphous standard," on pain of sanctions, that this "prior written consent requirement" is invalid under "the doctrine of unconstitutional conditions." Br. 6-7; Reply Br. 8. Farhang's "unconstitutional conditions" argument has no force in this case for at least three reasons. First, it is directed at Section 102(b)(3). As we have just determined, Section 105(b)(3) authorizes sanctions against him without regard to whether he executed consent as described in Section 102(b)(3). He is not being sanctioned for failing to execute a consent; he is being sanctioned for refusing to testify. Further, the "vagueness" and "due process" components of his argument are meritless.

As to vagueness, Farhang asserts broadly that "noncooperation" is an "constitutionally vague, amorphous, and ill-defined standard" against which to measure his conduct. Reply Br. 9; R.D. 22a at 13. The relevant statutory language here, though, in a case in which Farhang admits that he refused to testify in connection with an investigation, is the language authorizing the Board to impose sanctions if an associated person "refuses to testify…in connection with an investigation." Understandably, his briefing is devoid of any contention that this specific language is vague. Plainly, it is not vague, and it is all that is necessary to resolve this case.

Regarding the due process component of his "unconstitutional conditions" argument, Farhang asserts that he "has a constitutionally protected due process right," of which he would be deprived if he could be sanctioned for refusing to testify in the Board's investigation, "to be free from investigative procedures of a governmental actor, or resulting disciplinary proceedings, that deprive him of full and undiluted due process rights commensurate with those in federal court." Reply Br. 8. He claims the Board's procedures "fail to provide [a] sufficient level of due process commensurate with the potential penalties (akin to criminal penalties) that the Board may impose on an associated person for noncooperation." *Id.* at 10.

Farhang's amorphous, unfocused attack on the Board's investigatory and adjudicatory procedures implies that all of these rules fail because they do not comport

with the high level of procedural due process assigned to criminal judicial proceedings. As an initial matter, Farhang has made no showing that Board authority to impose a civil money penalty for refusing to testify is "so punitive in either purpose or effect...as to transform what was clearly intended as a civil remedy into a criminal penalty" such that some elevated level of due process is necessary. *See generally Hudson v. United States*, 522 U.S. 93, 99 (1997); *Hogan & Hartson v. Butowsky*, 459 F. Supp. 796, 799 (S.D.N.Y. Oct. 24, 1978) ("a more stringent standard of due process must be adhered to in criminal matters than in purely civil matters"); *Gary M. Kornman*, SEC Rel. No. 34-59403, 2009 WL 367635, *12-*13 (Feb. 13, 2009) (in rejecting double jeopardy argument, explaining that broker-dealer and investment adviser bars are civil, not criminal sanctions). Further, he ignores the established principle that the constitutional requirements of procedural due process do not demand that administrative agencies adopt "judicial-type procedures." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) ("[D]ifferences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.") (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143, (1940)). He also ignores the distinction between the investigative and adjudicative stages of a proceeding, a distinction that is critical to identifying the procedural due process protections that apply in each context. *United States v. Steel*, 238 F. Supp. 575, 577 (S.D.N.Y. 1965) ("[W]hen a government agency is conducting an investigation, as here, in contrast to making an adjudication, 'due process' does not require granting to those being investigated 'rights...normally associated only with adjudicatory proceedings.'") (quoting *Hannah v. Larche*, 363 U.S. 420, 442 (1960)); *Kevin Hall, CPA*, SEC Rel. No. 34-61162, 2009 SEC LEXIS 4165 at *73 (Dec. 14, 2009) (distinguishing adjudicative from investigative processes in the application of due process principles) (quoting *Friedman v. Rogers*, 440 U.S. 1, 18 (1979) and citing *SEC v. O'Brien*, 467 U.S. 735, 742 (1985) and *Hannah*, 363 U.S. at 440-43).

The Board's rules establish "fair procedures" for investigating and disciplining associated persons, as required by Sarbanes-Oxley Act Section 105(a), 15 U.S.C. 7215(a), and those rules comport with the due process requirements applicable to each function. At the investigative stage, PCAOB rules require Board authorization to initiate a formal investigation (Rule 5101); establish terms for participation of a witness's counsel in an investigative examination (Rule 5109(b)); and preserve the right to validly assert privileges, including that against self-incrimination (Rule 5106; *see* PCAOB Rel. No. 2003-015 at A2-33 (Sept. 29, 2003).[7/]

[7/] Farhang does not assert that his refusal to testify in this matter was based on the Fifth Amendment protection against self-incrimination or any other privilege. Indeed, for example, simply issuing a blanket refusal to testify, as Farhang did, does not properly invoke the Fifth Amendment. *See Burke v. Bd. of Governors of Fed. Res. Sys.*, 940

At the adjudicatory stage, PCAOB rules require Board authorization of an order instituting proceedings for noncooperation (Rule 5110); permit representation by counsel in the proceedings (Rule 5401(b)); permit a respondent to inspect and copy the documents upon which the Division intends to rely for a finding of noncooperation (Rule 5422(a)(2)); provide for an adversarial hearing before a disinterested hearing officer to develop relevant evidence and provide the respondent with a full and fair opportunity to present his defenses (Rules 5200, 5440-45); and provide for *de novo* review of the initial decision by the Board on petition by a party or on the Board's own initiative (Rule 5460), among other things. These PCAOB rules operate on the premise that any imposition of sanctions by the Board is then subject to multiple layers of appellate review, by the SEC and the federal courts. *See* 15 U.S.C. 7217(c); 15 U.S.C. 78y(a).

These rules, which have been approved by the Commission (*Order Approving Proposed Rules Relating to Investigations and Adjudications*, SEC Rel. No. 34-49704 (May 14, 2004)), provide ample process for firms and individuals subject to Board discipline. Farhang—who during these proceedings has been represented by counsel, obtained the setting aside of the default, received documents from the Division, asserted affirmative defenses, availed himself of the summary disposition process, and submitted materials to the hearing officer that were considered in the initial decision, and appealed the initial decision to the Board—has identified no denial of due process.

For all of these reasons, Farhang's "unconstitutional conditions" argument is no impediment to the imposition of sanctions in this case.[8/]

F.2d 1360, 1367 (10th Cir. 1991); *United States v. Malnik,* 489 F.2d 682, 685 (5th Cir. 1974) (collecting cases), *cert. denied,* 419 U.S. 826.

[8/] To the extent Farhang claims (*see* Reply Br. 8-9), as part of or in addition to his "unconstitutional conditions" argument, that sanctioning him for refusing to testify violates his "constitutionally protected due process rights" for some other reason than supposed defects in the Board's investigatory or disciplinary procedures or that the Constitution somehow limits the application of the Section 105(b)(3) authority only to persons who had executed a consent to cooperate with the Board, he provides no elaboration or support for any such propositions, and we see no valid basis for them. Because Farhang has not established that sanctioning him for refusing to testify impinges on any constitutionally protected interest, we need not reach his claim that, in sanctioning him, the Board must have a "compelling governmental interest," achieved through the "least restrictive means." Br. 7; Reply Br. 10-11. We do note, however, that Farhang's argument is based on an inapposite case involving government regulation of constitutionally protected speech. *See* Reply Br. 10 (citing only *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), a First Amendment case).

C. Civil penalties are appropriately available as a category of sanctions for noncooperation under the Sarbanes-Oxley Act.

Sarbanes-Oxley Act Section 105(b)(3) provides, as pertinent here, that if "a registered public accounting firm or any associated person thereof refuses to testify…in connection with an investigation under this section, the Board may…suspend or bar such person from being associated…[and] invoke such other lesser sanctions as the Board considers appropriate, and as specified by rule of the Board." Farhang argues that "[t]he words 'lesser sanctions' must be given meaning" and that the only way to do so is to adopt his view that "[w]hether the amount of a civil money penalty constitutes a 'lesser sanction' (than a permanent bar) and would be statutorily permitted necessarily turns on the unique and specific facts of each case." Br. 8. By contrast, the Board considered in implementing Section 105(b)(3) through rulemaking, and codified in its rules, what types of sanctions are legally available in noncooperation cases generally and then in each case in which it imposes sanctions, the Board separately determines from among the legally available sanctions the specific sanctions, whether non-monetary, monetary, or both, that are appropriate under the particular facts and circumstances. The language "lesser sanctions" has thus already been given a meaning—one implemented by the Board and approved by the SEC—and, for good reason, that meaning does not involve the approach Farhang urges.

Soon after the Board was created, it interpreted Section 105(b)(3)'s reference to "lesser sanctions" as including civil money penalties. That interpretation is reflected in a public rulemaking process that culminated in SEC approval of PCAOB Rule 5300(b), which includes civil money penalties among sanctions available for noncooperation with investigations. Not unlike Farhang, a commenter on the Board's proposal of Rule 5300(b) "expressed doubt that the [Sarbanes-Oxley] Act authorizes the imposition of money penalties for noncooperation," PCAOB Rel. No. 2003-015 at A2-77 (Sept. 29, 2003). In adopting Rule 5300(b), the Board disagreed with that comment, noting that "[w]e believe that an appropriately calibrated money penalty is a 'lesser sanction' than revocation of a firm's registration or a bar on association with a firm." *Id.* In accordance with Section 107 of the Sarbanes-Oxley Act, 15 U.S.C. 7217, and Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b), the SEC approved Rule 5300(b) on May 14, 2004, determining that the rule was "consistent with the requirements of the [Sarbanes-Oxley] Act and the securities laws" and was "necessary and appropriate in the public interest and for the protection of investors." SEC Rel. No. 34-49704, 2004 WL 1439833. As described earlier, the Board has since imposed civil money penalties for noncooperation with investigations, and the SEC, in the *Bassie* case, has sustained such penalties.

The interpretation reflected in PCAOB Rule 5300(b)(1) is eminently reasonable. *Cf. Gonzalez v. Reno,* 212 F.3d 1338, 1351 (11th Cir. 2000) (accepting interpretation

where it "comes within the range of reasonable choices" in interpreting statutory text). Congress generally gave the Board broad authority to impose "[a] full range of sanctions," including "substantial civil money penalties," if the Board finds that a registered firm or its partners or employees has "violated one or more of the rules within the Board's investigative jurisdiction." S. Rep. No. 107-205 at 11 (2002). The interpretation of Section 105(b)(3) as permitting the Board to identify civil money penalties as among the available categories of sanctions that, by nature, do not rise to the level of permanent or temporary removals from the practice of auditing public companies and broker-dealers is consistent with that broad authority.

More specifically, that interpretation is also consistent with the structure of Sarbanes-Oxley Act Section 105(c)(4), 15 U.S.C. 7215(c)(4), which sets out types of sanctions for violations of the Sarbanes-Oxley Act and Board rules and standards in more detail than the three types of sanctions listed in Section 105(b)(3), with civil money penalties listed below revocation/suspension of registration, bar/suspension from association, and limitation on activities, but above censure and additional professional education. A suspension or revocation of the registration of a firm in the securities industry, or a suspension or bar of an individual from associating with such a firm, can have a significant impact that, in terms of the damage to professional reputation and loss of gainful employment in the industry, exceeds a one-time civil money penalty. *Cf. PAZ Secs., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007) (generally describing "expelling a member from the NASD or barring an individual from associating with an NASD member firm" as "the securities industry equivalent of capital punishment") (citing *Steadman v. SEC*, 603 F.2d 1126, 1137-40 (5th Cir. 1979) (describing expulsion and associational bar as "the most drastic remedies at [the Commission's] disposal"), *aff'd on other grounds,* 450 U.S. 91 (1981)); *see also Kornman v. SEC,* 592 F.3d 173, 188 (D.C. Cir. 2010) (referring to a sanction other than permanent bar as a "lesser sanction"). It is reasonable to conclude that the most significant sanction authority granted the Board under the Sarbanes-Oxley Act is the power to deny an associated person or firm the ability to conduct audits of issuers or broker-dealers. Farhang essentially concedes this, claiming that a permanent bar "will ruin his career, livelihood, and ability to earn anything meaningful" without explaining how a one-time $75,000 penalty would be worse than this. Reply Br. 11.

Additionally, the interpretation reflected in PCAOB Rule 5300(b) is consistent with the approach of FINRA, whose rules and practice the Commission has considered in reviewing PCAOB disciplinary action. *See S.W. Hatfield, CPA,* SEC Rel. No. 34-69930, 2013 SEC LEXIS 1954, *4-*5, *89*-*97 (July 3, 2013); *Bassie*, 2012 SEC LEXIS 89, *40. Indeed, based on statutory authority that is no more specific on the money

penalty point than is Section 105(b)(3),[9/] the Commission has regularly upheld money penalties imposed by registered securities associations on associated persons of their members for failing to provide requested information. *See Robert Marcus Lane*, SEC Rel. No. 34-74269, 2015 WL 627346, *1, *21-*22 (Feb. 13, 2015) (sustaining $25,000 fine and two-year suspension imposed on individual who failed to timely respond to FINRA information request); *CMG Inst'l Trading, LLC*, SEC Rel. No. 34-59325, 2009 WL 223617, *1, *8-*10 (Jan. 30, 2009) (sustaining $25,000 joint and several fine and two-year suspension imposed on firm and individual that failed to completely respond to NASD information request).[10/]

Farhang counters by loosely and incorrectly characterizing the PCAOB as "essentially a federal agency that need not comply with federal salary caps" and then asserting that he is "unaware of any federal agency that has the power to impose civil money penalties for 'noncooperation.'" Br. 4. But if federal agencies' organic statutes do not provide authority identical to what Congress provided to the Board in Section 105(b)(3), that does not mean that Congress did not provide it to the Board. Moreover, Farhang's argument overlooks the fact that, unlike the Board, it is common for federal agencies to have direct access to the courts to enforce compliance with administrative

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[9/] In the case of a registered securities association, such as FINRA, the relevant statutory authority includes Section 15A(g)(3)(C) of the Exchange Act, 15 U.S.C. 78*o*-3(g)(3)(C), ("registered securities association may bar any person from becoming associated with a member if such person does not agree: (i) to supply the association with such information with respect to its relationship and dealings with the member as may be specified in the rules of the association") and Section 15A(h) of that Act, 15 U.S.C. 78o-3(h), (registered securities association may impose disciplinary sanctions against "a person associated with a member" for violations of a rule of the association).

[10/] Farhang notes the fact that the SEC has authority, under Exchange Act Section 21(e), 15 U.S.C. 78u(e), to seek through the courts to enforce PCAOB money penalties that the Commission has affirmed. Br. 4-5; Reply Br. 4 n.10 (misidentifying the statutory provision as 15 U.S.C. 78u(d)(3)(A)). Farhang argues that this is a difference between PCAOB money penalties and FINRA money penalties that renders FINRA's practice irrelevant to the issue here. In fact, however, the authority provided to the Commission by Section 21(e) encompasses money penalties imposed by a registered securities association, which FINRA is, to the same extent that it encompasses PCAOB money penalties. Furthermore, logically, a view that PCAOB civil money penalties, which "can be enforced through the federal court system" (Br. 5), would be more meaningful and effective in addressing noncooperation than FINRA fines, mischaracterized as a "paper tiger of no consequence in court" (*id.*), does not mean that PCAOB money penalties would be invalid but instead could bolster the very reasonableness of imposing them.

subpoenas that those agencies may issue and that it is then the court's province to enforce noncompliance with a judicial order. *See, e.g., Bassie*, 2012 SEC LEXIS 89, *46 n.47; 7 Op. O.L.C. 131 (1983) (discussing the myriad agencies that have subpoena power, explaining the general rule that, "[w]hen an individual refuses to comply with a subpoena, an agency must go to court, represented either by agency lawyers or by the Attorney General, to have it enforced," and describing how the court then presides over a process for determining if the respondent "should be held in contempt for failure to obey the court order"). Sanctions sought in a contempt proceeding can include monetary fines in significant amounts. *See, e.g., SEC v. Yuen*, SEC Lit. Rel. No. 18095, 2003 WL 1900835 (Apr. 18, 2003) (noting filing of civil contempt application in federal district court for failing to appear to testify per subpoena and requesting that the court hold respondent in contempt, order him incarcerated, and impose a daily civil fine of $50,000, doubling daily, until he purges his contempt by appearing for testimony).

Having appropriately implemented the authority given by Section 105(b)(3) in promulgating Rule 5300(b)(1), the Board applies that rule to the facts and circumstances presented in each case to determine which of the specified legally available sanctions are appropriate in that case to protect investors' interests and further the public interest in the preparation of informative, accurate, and independent issuer audit reports. *See* Sarbanes-Oxley Act Section 101(a); *see also* Section 101(c)(5), 15 U.S.C. 7211(c)(5). That involves quintessentially a conclusion about "the relation of remedy to policy," which is "peculiarly a matter" for the body authorized by law to impose the sanctions to decide. *Cf. American Power & Light*, 329 U.S. 90, 112 (1946); *Tager v. SEC*, 344 F.2d 5, 8-9 (2^{d} Cir. 1965); *County Produce, Inc. v. U.S. Dept. of Agriculture*, 103 F.3d 263, 266-67 (2^{d} Cir. 1997); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily…to the fashioning of policies, remedies, and sanctions").

Farhang offers no authority or reasoning that would compel the adoption of his alternative position that the Board is required to determine whether a civil money penalty is a legally available sanction under Sarbanes-Oxley Act Section 105(b)(3) as a threshold issue on a case-by-case basis. Farhang's position would require consideration of whether the amount of a particular civil penalty is sufficiently great (by some undefined measure) compared to a revocation, bar, or suspension, in the context of all of the facts and circumstances of each individual case and each respondent's personal situation, as to render it wholly unavailable as a sanction. That position would require the statute to be re-interpreted anew with each case and impose a nebulous, difficult-to-administer construct for determining a threshold question of legal authority.

In sum, Farhang has not identified any defect in the Board's rules or processes as a general matter, nor any defect in the proceeding against him specifically, that

would prevent the Board from imposing sanctions available under Sarbanes-Oxley Act Section 105(b)(3) as implemented by PCAOB Rule 5300. We now turn to a determination of the sanctions appropriate in this case.

VI.

In determining appropriate sanctions in a particular case, we consider the nature, seriousness, and circumstances of the violations and any potentially aggravating or mitigating factors supported by the record, to discharge our statutory responsibility to protect investors' interests and further the public interest in the preparation of informative, accurate, and independent issuer audit reports. *See* Sarbanes-Oxley Act Section 101(a); *see also* Section 101(c)(5) (in identifying duties of the Board, referring to objective "to promote high professional standards among, and improve the quality of audit services offered by, registered public accounting firms and associated persons thereof" or "otherwise to carry out this Act, in order to protect investors, or to further the public interest"); *Gately & Associates, LLC*, SEC Rel. No. 62656, 2010 SEC LEXIS 2535, *50 n.52 (Aug. 5, 2010) ("the appropriate sanctions in any case depend on the particular facts and circumstances presented rather than on a comparison with other cases involving different circumstances"). Farhang makes no argument that, if the Board has the legal authority to sanction him for his refusal to cooperate with the investigation, a censure and associational bar would be unwarranted, only that a civil money penalty would be inappropriate. *See, e.g.,* Reply Br. 11.

A refusal to cooperate with a Board investigation is serious misconduct warranting strong sanctions. As discussed above, "investigations play a crucial role in furthering the Board's goals of investor protection and the preparation of informative, accurate, and independent audit reports," and "[t]he Board's power to impose appropriate sanctions in disciplinary proceedings is fundamental to its ability to act in the public interest." *Bassie*, 2012 SEC LEXIS 89, *40 (citing *Howard Brett Berger*, SEC Rel. No. 34-58950, 2008 WL 4899010, *4 (Nov. 14, 2008)).

Farhang was well-situated to provide potentially valuable information, given his involvement as audit manager for the audit under investigation. Farhang initially agreed to comply with the June 30, 2015 ABD. After he later reversed course, one of his stated reasons was that he had "more important financial obligations" than those associated with testifying. This indicates that he is not willing or able to manage both his regulatory responsibilities and his personal obligations. Farhang's refusal to cooperate with the investigation came suddenly after the revelation, with his counsel present, of information suggesting possible misconduct on Farhang's part in connection with the Issuer A audit. And Farhang repeatedly refused to testify even after the Division reminded him he could represent himself and offered to minimize the expense and inconvenience of testifying by covering reasonable expenses related to appearing, or conducting the

testimony in Los Angeles or at another location convenient to him. This raises the concern that his noncooperation was designed to avoid responsibility for possible misconduct. Only long after receiving the ABD and initially providing certain documents and agreeing to testify did Farhang, represented by the same counsel, make any reference to legal objections to complying with Board requests for information, and Farhang declined at that time to engage with the Division in any detail about the substance of his objections. Even as to the documents he had provided, his refusal to testify deprived the PCAOB investigators of any opportunity to examine him about those materials and their relation to other documents or testimony, and to determine whether they truly comprise the total universe of relevant information in his possession.

Farhang's refusal to testify "frustrate[d] the oversight system envisioned by Sarbanes-Oxley, impeding the Board's ability to discover violations." *Bassie,* 2012 SEC LEXIS 89, *40. Moreover, his deliberate choice to avoid testifying displayed little or no regard for the Board's processes and, by extension, for its public-interest mandate. Farhang has given no indication, at least since refusing to testify, that he recognizes the importance of cooperation to the Board's mandate. *See generally Gale Moore, CPA*, PCAOB File No. 105-2012-004, at 49 (Aug. 23, 2016) (citing cases discussing lack of appreciation of regulatory responsibilities and lack of recognition of the wrongful nature of conduct as supporting imposition of associational bar). Furthermore, although Farhang has asserted that he "left the practice of auditing public companies" in 2015, there would be no impediment, absent Board sanctions, to his returning to that practice and, indeed, doing so would appear to be attractive, as Farhang states that he earned a higher income while engaged in the practice of auditing public companies. R.D. 22a at 20. Under these circumstances, we conclude that a permanent bar is appropriate to prevent Farhang from undermining Board processes in the future and jeopardizing the protection for investors that those processes provide. *Bassie*, 2012 SEC LEXIS 89, *42; *O'Donnell*, PCAOB File No. 105-2010-002 at 7-8 (Oct. 19, 2010).

We also conclude that a civil money penalty is warranted to impress upon Farhang and others the seriousness of choosing not to cooperate with a Board investigation, as well as to address the harm inherent in such conduct, to the Board's ability to carry out its investigation and to investors deprived of important protection they should have had under the Sarbanes-Oxley Act. Arguing for mitigation, Farhang has observed that, unlike the individual respondents in the three prior litigated PCAOB noncooperation cases in which $75,000 penalties were assessed—*Bassie, O'Donnell,* and *Davis*—he was not a controlling partner of a co-respondent firm, and thus his actions were not attributable to any firm and did not translate into equivalent noncooperation by a firm. R.D. 24 at 2. Farhang has also implied that he earned little or no fees from issuer audits after the date on which he refused to testify. *Id.* at 3. We accord these factors some weight in the analysis. It bears noting, however, that even on their own terms, these arguments do not exclude the possibility that Farhang's

refusal to testify still impeded the Firm's cooperation, they do not lessen Farhang's own responsibility to cooperate, and they do not suggest, particularly in light of the points made earlier in this section, that he was unable to provide any, or any more, distinctive and important information in his own right. Nor do they necessarily mean that Farhang did not collect, or seek to collect, some fees from auditing issuers after refusing to testify in September 2015. Indeed, Farhang has stated that "[f]or the 2015 calendar year," he collected over $70,000 from "audit and review work part-time for three issuers" and "in 2015" he "left the practice of auditing public companies," without ever specifying when in 2015 these occurred. R.D. 22a at 20-21.

As we have made clear, refusals to cooperate with investigations can appropriately be sanctioned with civil money penalties because such refusals cause at least indirect harm to investors that it may never be possible to quantify and thwart our ability to identify and rectify violations of statutes, rules, and standards we are charged with enforcing. *See Davis,* PCAOB File No. 105-2009-004 at 19 ("Investors and markets are put at risk, and perhaps harmed in ways that never become known, when a regulatory investigation is improperly thwarted by a regulated person's refusal to provide information."). The Commission has found civil penalties appropriate regardless of whether unjust enrichment resulted from the misconduct or there was a finding of a history of prior misconduct. *Bassie*, 2012 SEC LEXIS 89, *46 & n.46 (citing *PHLO Corp.*, SEC Rel. No. 34-55562, 2007 WL 966943, *15 n.84 (Mar. 30, 2007) (imposing civil penalty in absence of unjust enrichment or disciplinary history)). And properly calibrated civil money penalties appropriately provide deterrence, which is necessary given the facts here. *See id*. at *51-*52 ("While imposing a larger penalty in this case might provide an even greater deterrent against similar stalling by other registered public accounting firms and their associated persons, a civil penalty of $75,000 appears sufficient to have a deterrent effect on a firm such as Bassie's.").

We have previously described our approach to consideration of imposing civil money penalties under Sarbanes-Oxley Act Section 105(b)(3) and PCAOB Rule 5300(b)(1). *See, e.g., Bassie*, PCAOB Rel. No. 105-2009-001 at 13-15, 19; *Davis,* PCAOB File No. 105-2009-004 at 16-19, 21; *O'Donnell,* PCAOB File No. 105-2010-002 at 8-11, 14. Applying that approach in this case, in light of the above-described conduct and considerations of harm and need for deterrence, as well as the points described above that Farhang raised in an effort to distinguish our prior adjudications imposing a $75,000 civil penalty for the fundamentally serious misconduct of noncooperation with a PCAOB investigation, we have determined that a $50,000 civil penalty is appropriate under the circumstances. While this is well below the maximum civil money penalty we could impose under Rule 5300(b)(1), it nonetheless reflects the seriousness of Farhang's refusal to testify, including the harm to investors from the possibility that such conduct may have prevented the Board from uncovering evidence that would have revealed failures or violations warranting an even steeper civil money penalty, and is

sufficient to deter similar noncooperation by others. Overall, we conclude that the sanctions we impose in this case are sufficient to protect investors and further the significant public interest at stake without being in any way excessive or oppressive.

VII.

We now address Farhang's assertions that in determining whether to impose a civil money penalty in this case, "[t]he Board must consider Respondent's 'ability to pay,' and [that] Respondent has proven that he has no ability to pay." Reply Br. 12 n.14. Neither assertion is correct, as we explain below.

As background, in a telephone conference on March 9, 2016, the hearing officer raised on his own the question whether, "if a Respondent in a PCAOB proceeding is unable to pay a penalty amount," then "should [that amount] be waived?" R.D. 16b at 5. The Division responded that it "disagree[d] as a general proposition [and], in particular, disagree[d] in this context of a non-cooperation proceeding." *Id.* The hearing officer, in a March 11, 2016 order setting a schedule for filing cross-motions for summary disposition, directed Farhang to "promptly provide to the Division copies of Respondent's 2015 and 2014 federal income tax returns, as well as a sworn financial statement detailing all of Respondent's assets and liabilities." R.D. 18 at 2.

On March 31, 2016, pursuant to that order, the Division filed a statement of position explaining that it had reviewed the financial information Farhang submitted and did not believe that the information established an inability to pay a civil money penalty. R.D. 20 at 1. Among other things, the Division noted that the information disclosed that Farhang managed his income and expenses through an S corporation, which reported income in 2014 and 2015 of $119,200 and $83,306, respectively—significantly higher than the adjusted gross income amounts of $51,864 and $39,800 for those years that he had earlier represented he made. *Id.* at 2. The Division also stated that many of the expenses he disclosed "appear[ed] to be highly discretionary in nature," such as owning a 2014 Prius while also leasing a 2014 BMW 528i for $10,000 a year, and pointed out that between late 2014 and early 2016, Farhang's reported cash on hand had shrunk from $146,771 to $12,855 and it was "unclear where the money went." *Id*. The Division concluded that, although "[i]t would be difficult…to make a more detailed evaluation of Respondent's ability to pay a civil money penalty without a hearing and an opportunity to fully examine Respondent with respect to the financial information he has presented," the Division "[n]evertheless…believes that this financial information, on its face, demonstrates that Respondent has the ability to pay a substantial civil money penalty." *Id*. at 2-3. In its summary disposition motion papers, the Division reiterated its position that as a legal matter inability to pay is "'irrelevant' in cases involving an individual's egregious noncooperation" and that, if the hearing officer were to deem it relevant, an evidentiary hearing should be held on the issue. R.D. 23a at 24-25, n.108.

Farhang contended in his summary disposition motion papers, to which he attached the financial information, that he had "no current ability to pay" the $75,000 penalty the Division sought but "only a small civil money penalty." R.D. 22a at 19-21, n.22. He stated that he had risen to the level of a non-equity partner about two years before leaving the Firm at the end of 2014 and had supported himself in 2015 doing part-time work at another issuer audit firm and as an outside consultant to private clients and a bookkeeper. *Id.* at 20; R.D. 22b at 3; R.D. 24 at 2. But he emphasized on the basis of two months of data in 2016 that, in transitioning, at age 56, to "try[ing] to earn a living consulting, bookkeeping, and providing other accounting services to private clients" on a full-time basis, he had made what he regards as "almost nonexistent" income (Br. 9 n.4). R.D. 22a at 20-21. He made no reference to pursuing any other form of gainful employment. Without specificity or substantiation, he asserted that his draw-down of most of the large cash account over the prior two years was used "to cover his expenses in the face of declining revenues." *Id.* at 20 n.23. He represented that he pays alimony and child support, referred to the general difficulty attendant to living in expensive southern California, and claimed that his personal savings, less the funds in retirement accounts, amount to less than the penalty sought. R.D. 22b at 3-5.

In the initial decision, the hearing officer determined to impose a $75,000 civil money penalty, finding the sanction was "appropriate" and reflected "the seriousness of noncooperation, including the harm to the public when noncooperation prevents the Division from uncovering possible evidence of violative conduct." I.D. 19. But the hearing officer also stated that Farhang had shown "by a preponderance of the evidence" that "he has limited financial resources and no current prospects of earning more than a minimal income, particularly since this Initial Decision bars Farhang from association with a registered public accounting firm." I.D. 21. Ultimately, despite ordering Farhang to pay a civil penalty, the initial decision declared that "such payment will be waived based on Farhang's demonstrated inability to pay a civil penalty." I.D. 22.

Before us, Farhang takes the position that if we disagree with his other arguments about a civil money penalty in this case, we should "waive" payment of a civil penalty, referencing the initial decision's discussion of inability to pay. Reply Br. 12 n.14. The initial decision's discussion is not an adequate basis of decision here, and, despite the direction in our briefing order that the parties address inability to pay issues, Farhang's briefing contains only a cursory discussion of the subject.

As the Commission noted in *Bassie*, the Sarbanes-Oxley Act "does not recognize ability to pay as a factor to consider in determining whether to impose a civil money penalty." 2012 SEC LEXIS 89, *52 n.53. To the extent Farhang contends that the

PCAOB is compelled to consider inability to pay in imposing monetary sanctions, he cites no support for that proposition.[11/]

Further, as we stated in *Bassie,* "even if we were guided by the Exchange Act section 21B(d) approach," applicable to SEC administrative proceedings, with regard to ability to pay, "that approach commits to the agency's discretion the question of whether ability to pay is relevant to penalty considerations in any particular case." PCAOB Rel. No. 105-2009-001 at 18. We then stated that, even in the exercise of such discretion, "evidence concerning Respondents' ability to pay a penalty would be irrelevant to our determination of whether to impose a penalty" because of "the egregiousness of Respondents' noncooperation[] and the need to protect investors and advance the public interest by deterring such noncooperation." *Id*. The Commission agreed. 2012 SEC LEXIS 89, *52 n.53 (citing *Thomas C. Bridge*, SEC Rel. No. 34-60736, 2009 WL 3100582, *25 (Sept. 29, 2009) ("when conduct is 'sufficiently egregious,' the Commission may impose a sanction despite a demonstrated inability to pay"), *petition*

11/ In his opening brief, filed on October 31, 2016, Farhang asserted without citation to authority that inability to pay "is a factor that is considered in determining civil money penalties by the EPA, FDA, OCC, FCC, FAA, FTC, FDIC, HUD, CFPB, DHHS, and also, importantly, and very recently, by the SEC (before ALJ Carol Fox Foelak)." Br. 9. In a footnote, Farhang's counsel represented that he "will be filing a statement of authority with supporting citations within the next week." Br. 9 n.3. One month later, on the afternoon the Division's responsive brief was due, Farhang's counsel filed an "Addendum of Citations in Further Support of Respondent's Opening Brief," consisting of a list of citations and parenthetical descriptions purportedly supporting the assertion in his opening brief about consideration of inability to pay by various federal agencies. R.D. 31. This submission was filed after his opening brief and without leave (and without seeking leave) from the Board. *See* Board Rule 5462(a) (stating that, "[u]nless otherwise provided, opening briefs shall be filed within 40 days of the date of the briefing schedule order," that "exceptions to the findings or conclusions being reviewed…shall be supported by…concise argument including citation of such statutes, decisions and other authorities as may be relevant," and that "[n]o briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Board"). We therefore reject it as untimely. But, in any event, the submission makes no attempt to establish the relevance of the citations to the particular statutory regime under which the PCAOB operates or to the context of noncooperation with an investigation, nor is such relevance apparent. Farhang's assertion that "virtually every federal administrative agency (even the SEC post-*Bassie*) looks at a party's inability to pay when calculating civil money penalties" (Reply Br. 12) is not only divorced from any context but, on its face, concedes that this is not necessarily a universal practice even among agencies ("virtually every").

denied sub nom., *Robles v. SEC*, 2010 WL 5479603 (D.C. Cir. Dec. 30, 2010)). The same analysis would apply here, given Farhang's conduct, discussed above.

The initial decision acknowledged all of the above-described, on-point authority, and found that imposition of a substantial civil penalty was appropriate in this case. Yet the decision provided no explanation for nevertheless deeming Farhang's asserted inability to pay to be relevant to, indeed singularly determinative of, the ultimate ruling on a civil penalty, when it declared that payment of the penalty "will be waived." Neither of the two cases cited by the initial decision as its only support for ordering and then unilaterally "waiving" payment of the penalty did what the initial decision did. Rather, in each case the court reached conclusions about ability to pay that the court factored into its determination of what, if any, civil penalty to impose in the first place.[12/] Farhang provides no other support for, and does not urge, the initial decision's actual holding in this regard. Instead, he mischaracterizes the decision as having "waived" the civil penalty "in order to comply with [] Section 105(b)(3)'s limit on sanctions, and to respond to constitutional issues raised by Respondent" (Br. 10; Reply Br. 12 n.14), when, in fact, the decision squarely rejected his Section 105(b)(3) and constitutional arguments.

Accordingly, we treat the issue before us as not whether to provide relief from a civil money penalty once imposed, but rather, whether there is reason for us to take account of Farhang's ability to pay as we consider what, if any, civil money penalty to impose. Because of the egregiousness of the conduct, as discussed above, we do not view information about Farhang's ability to pay as relevant to the question of what, if any, civil money penalty to impose in this case. In any event, where inability to pay is relevant, the person claiming it bears the burden of proving it, *see, e.g., Vladlen "Larry" Vindman*, SEC Rel. No. 34-53654, 2006 WL 985308, *9 (Apr. 14, 2006), and the record here would not persuade us that Farhang is unable to pay the civil money penalty.[13/]

12/ *See SEC v. Rubin*, 1993 WL 405428, *6-*7 (S.D.N.Y. Oct. 8, 1993); *SEC v. Mohn*, 2005 WL 2179340, *9 (E.D. Mich. Sept. 9, 2005); *see also SEC v. Warren*, 534 F.3d 1368, 1369 (11th Cir. 2008) (using term "waiver" to refer to when a law enforcement organization, in its discretion, forgoes pursuit of monetary relief). Also unlike the present case, *Rubin* and *Mohn* noted that a civil penalty would be in addition to a full measure of other monetary relief, and *Mohn* reasoned that it was "in the interests of judicial economy" to refrain from imposing a civil penalty "rather than assessing civil penalties against [defendants] and waiting for them to seek a waiver" from the court, which could preside over an action to collect that same penalty.

13/ The initial decision decided inability to pay in Farhang's favor without addressing the Division's hearing request, made overly general or conclusory observations, and did not discuss in any detail, for example, the Division's specific arguments about Farhang's showing and his concession that he could pay some civil money penalty.

VIII.

For the reasons described above, we conclude that, in order to protect the interests of investors and to further the public interest, Farhang should be censured, permanently barred from associating with any registered public accounting firm, and required to pay a civil money penalty of $50,000.

An appropriate order will issue.[14/]

By the Board.

[14/] We have considered all of the parties' contentions regarding the issues addressed in this opinion and we have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion. Farhang raised two additional legal challenges in his motion for summary disposition before the hearing officer that he did not specify in his petition for Board review nor mention in his briefs to the Board. R.D. 22a at 21-23. Farhang's opening appeal brief purports to "incorporate[] all of the arguments in his underlying Memorandum of Points and Authorities in Support of his Motion for Summary Disposition." Br. 5. To the extent he seeks by that means, rather than by his petition for review, to raise the two additional issues, those challenges are waived. *See* PCAOB Rule 5460(d) (unless the Board otherwise specifies, "[r]eview by the Board of an initial decision shall be limited to the issues specified in the petition for review"); *see generally, e.g., Laurie Jones Canady*, SEC Rel. No. 34-41250, 1999 WL 183600, *12 (Apr. 5, 1999). Furthermore, contrary to Farhang's purported "incorporat[ion]," any arguments not included in a party's appeal briefing, even if on points raised in the petition for review, are subject to waiver, as the parties here were advised when the Board's briefing order was distributed. R.D. 29 at 4; *see Mark E. Laccetti, CPA*, PCAOB Rel. No. 105-2006-007, 69 n.24 (Jan. 26, 2015), *sustained*, SEC Rel. No. 34-78764, 2016 WL 4582401 (Sept. 2, 2016), *appeal filed*, No. 16-1368 (D.C. Cir. Oct. 26, 2016). PCAOB Rule 5462(b) requires that, in briefs filed with the Board, "[e]ach exception to the findings or conclusions being reviewed shall be stated succinctly. Exceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions and other authorities as may be relevant." Reference in briefing to a prior filing in the proceeding does not satisfy this requirement and would have the effect of undermining the length limitations in PCAOB Rule 5462(c).

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PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

In the Matter of S. Brent Farhang, CPA, Respondent	PCAOB File No. 105-2016-001 **ORDER IMPOSING SANCTIONS** March 16, 2017

On the basis of the Board's opinion issued this day it is

ORDERED that S. Brent Farhang is censured; and it is further

ORDERED that S. Brent Farhang is barred from associating with any registered public accounting firm; and it is further

ORDERED that S. Brent Farhang shall pay a civil money penalty in the amount of $50,000 by (a) United States postal money order, certified check, bank cashier's check, or bank money order, (b) made payable to the Public Company Accounting Oversight Board, (c) delivered to the Controller, Public Company Accounting Oversight Board, 1666 K Street, N.W., Washington, D.C. 20006 within 30 days after the effective date, described below, and (d) submitted under a cover letter which identifies S. Brent Farhang as a respondent in these proceedings, sets forth the title and PCAOB File Number of these proceedings, and states that payment is made pursuant to this Order, a copy of which cover letter and money order or check shall be sent to Office of the Secretary, Attention: Phoebe W. Brown, Secretary, Public Company Accounting Oversight Board, 1666 K Street, N.W., Washington, D.C. 20006.

Effective Date of Sanctions: If Respondent does not file an application for review by the Securities and Exchange Commission (Commission) and the Commission does not order review of the sanction on its own motion, the effective date of the sanction shall be the later of the expiration of the time period for filing an application for Commission review or the expiration of the time period for the Commission to order review. If Respondent files an application for review by the Commission or the Commission orders review of the sanction, the effective date of the sanction shall be the date the Commission lifts the stay imposed by Sarbanes-Oxley Act Section 105(e), 15 U.S.C. 7215(e).

By the Board.

Phoebe W. Brown
Secretary

March 16, 2017